

# RESTATING THE “ORIGINAL SOURCE EXCEPTION” TO THE FALSE CLAIMS ACT’S “PUBLIC DISCLOSURE BAR”

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## I. INTRODUCTION

The case of *Rockwell International Corp. v. United States*, currently before the United States Supreme Court, presents a big question in a seemingly small case.<sup>1</sup> The Court's decision in this matter will set a standard under the federal False Claims Act (FCA) that will affect how the government addresses the multi-billion-dollar problem of companies who cheat the federal government under their contracts or federal programs.<sup>2</sup> The case is not about Rockwell's guilt—a jury has already found that Rockwell knowingly submitted false claims under its federal contract.

Rather, the primary question is whether a private plaintiff who files and participates in the civil action under the FCA is barred from receiving a share of the government's recovery under the Act's public disclosure bar.<sup>3</sup> The parties to the *Rockwell* case essentially agree that the allegations of fraud were "publicly disclosed" prior to the private party plaintiff filing the action on behalf of the government; therefore, the private plaintiff must demonstrate that

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1. *Rockwell Int'l Corp. v. United States*, Docket No. 05-1272, certiorari granted Sept. 26, 2006. See [www.supremecourtus.gov/docket/05-1272.htm](http://www.supremecourtus.gov/docket/05-1272.htm). In its brief, Rockwell is not asking the Court to reverse the finding that it violated the FCA. Rather, it argues that the private party is not entitled to receive a share from the government's \$4.1 million jury verdict because he does not meet all of the statutory requirements. See Brief of Petitioner, *Rockwell*, No. 05-1272, pp. 9-13 (October 26, 2006) (a copy is on file with the author). Although the bounty is paid from the government's recovery, Rockwell points out that if the private party is dismissed, Rockwell will not have to pay statutory attorney fees to the private party, which exceeds \$10 million. *Id.* at p. 9 note 6.

2. The False Claims Act (FCA) is located at 31 U.S.C. §§ 3729–3733 (2000).

3. The question presented in the *Rockwell* case is: "Whether the Tenth Circuit erred by affirming the entry of judgment in favor of a *qui tam* relator under the False Claims Act, based on a misinterpretation of the statutory definition of an 'original source' set forth in 31 U.S.C. § 3730(e)(4)?" See [www.supremecourtus.gov/docket/05-1272.htm](http://www.supremecourtus.gov/docket/05-1272.htm). The thrust of Rockwell's argument is that the private party could not satisfy the "direct and independent knowledge" requirements of the "original source exception" because he stopped working for the company three years prior to Rockwell's submission of false claims and he failed to see "the actual fraudulent submission to the government." See *United States ex rel. Stone v. Rockwell Int'l Corp.*, 92 F. App'x 708, 723 (10th Cir. 2004) (emphasis in original). The private individual, on the other hand, argues that the Tenth Circuit properly found that his prediction that the system would not work was based upon personal observations which satisfies the original source exception, and that there is no requirement to actually see the false claim submitted to the government. *Id.*

he was an “original source” of the information to qualify for a reward.<sup>4</sup> The parties, however, disagree over the legal standard to be applied to the “original source” rule.

Because the FCA is the government’s most important tool in combating fraud, it is vital for the courts to interpret and apply each of the provisions of the statute properly.<sup>5</sup> The FCA contains several *qui tam* provisions that enable a private party, known as a relator, to file a lawsuit on behalf of the government to redress fraud against the government and to share in a portion of the recovery.<sup>6</sup> The government needs help from private parties to combat fraud.<sup>7</sup> In fact, 70 percent of the government’s civil fraud recoveries are from *qui tam* cases filed by private parties.<sup>8</sup> The various segments of the statute combine to create a delicate balance of rewarding those willing to step forward in filing FCA *qui tam* lawsuits while setting appropriate parameters limiting purely opportunistic behavior in certain enumerated instances.<sup>9</sup>

The FCA provides a graduating reward fee schedule between zero and 30 percent, depending upon either the “significance of the information”<sup>10</sup> or “the extent to which the person substantially contributed to the prosecution of the

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4. Although this short description is helpful to begin to frame the issue pertaining to the meaning of the “original source” exception, each of the conditions of the FCA have very technical meanings and require precision. This Article methodically evaluates the statutory framework and restates the standards and terms in a manner consistent with the text and purposes of the statute.

5. *Avco Corp. v. U.S. Dep’t of Justice*, 884 F.2d 621, 622 (D.C. Cir. 1989).

6. The term “*qui tam*” is “short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means ‘who pursues this action on our Lord the King’s behalf as well as his own.’” *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769 n.1 (2000). A “relator” is one who relates the fraud action on behalf of the government. *See United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 225 (1st Cir. 2004) (“A ‘relator’ is ‘[a] party in interest who is permitted to institute a proceeding in the name of the People or the Attorney General when the right to sue resides solely in that official.’ *Black’s Law Dictionary* 1289 (6th ed. 1990).”).

7. *See infra* Section II.B–C.

8. These figures are based upon publicly available statistics provided by the Department of Justice regarding its recoveries under the False Claims Act from FY 1987 through FY 2006. *See* “Fraud Statistics” by Civil Division, U.S. Department of Justice, dated April 21, 2006. The author has a copy of these statistics on file. Over the past several years, there has been a significant rise in the amount of civil fraud recoveries under federal programs. For instance, in the first ten years after the 1986 FCA amendments, the DOJ recovered \$4 billion, but during the last ten years it recovered nearly \$12 billion. *Id.*

9. *See infra* Section III.

10. 31 U.S.C. § 3730(d)(1) (zero to 10 percent range).

action.”<sup>11</sup> To be eligible for a reward under the *qui tam* provisions of the FCA, it is generally not necessary for a relator to meet the definition of an “original source.” There is, however, one notable exception: if the “public disclosure bar” applies, a relator must meet the “original source exception.”<sup>12</sup> However, the public disclosure bar only applies in certain limited situations. First, an enumerated public disclosure identifying the fraud allegations must occur (thus creating an opportunity for the government to pursue the action on its own).<sup>13</sup> In addition, in the face of a qualifying public disclosure, a relator is still permitted under the FCA to proceed unless: (1) the *qui tam* suit is deemed “based upon”<sup>14</sup> the public disclosure, and (2) the relator is not an “original source.”<sup>15</sup>

In many *qui tam* cases each year, the parameters of the “original source exception” to the “public disclosure bar” are at issue.<sup>16</sup> Specifically, courts are being asked to determine the type and extent of knowledge that a private person must possess to qualify as an “original source.” The parties are often at odds over what standard applies. To add to the confusion, various federal circuit courts have applied a mixture of standards.<sup>17</sup> For instance, in the *Rockwell* case, Rockwell has asked the Supreme Court to define the term “original source” as requiring a person not only to possess a certain high level of firsthand knowledge of the fraudulent scheme, but additionally to have seen with his own eyes the false statement submitted to the government.<sup>18</sup> This Article argues that such requirements would go beyond the plain text and purpose of the statute.<sup>19</sup> Rockwell’s proposed definition would also severely limit the ability of large pools of relators from joining forces with the government in a cooperative effort to recover ill-gotten gains from wrongdoers.

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11. *Id.* (15 to 25 percent range). *See also* § 3730(d)(2) (a court utilizes a reasonableness approach to setting the award in the 25 to 30 percent range in cases the government declines to intervene.)

12. *Id.* at § 3730(e)(4)(A)–(B).

13. *Id.* at § 3730(e)(4)(A).

14. There is considerable debate over whether “based upon” means derived from or similar to the publicly disclosed information. *See infra* note 89.

15. 31 U.S.C. § 3730(e)(4)(A)–(B).

16. *Id.*

17. This actually leads to forum shopping. The FCA permits nationwide jurisdiction and has generous venue provisions. *See id.* at § 3732; *infra* notes 77–81.

18. Petition for a Writ of Certiorari, *Rockwell*, No. 05-1272, 2006 WL 886721 at \*19 (April 4, 2006); 31 U.S.C. § 3730(e)(4)(A).

19. *See infra* Section III.D.2.

Not everything Rockwell proposes, however, is without validity. Rockwell is correct that the various federal circuits have applied a wide range of approaches when interpreting portions of the *qui tam* statute, particularly by the public disclosure and original source provisions. Given the divergent approaches taken by the lower courts, the time is ripe for the Supreme Court to clarify the law and set forth a uniform standard for the original source exception. This Article argues that the Supreme Court needs to establish a uniform standard that applies to all *qui tam* cases regardless of which federal circuit a particular case is filed. This argument will develop by surveying the current legal landscape,<sup>20</sup> identifying the various hidden landmines,<sup>21</sup> and positing a formulation of the law that satisfies the goals and purposes of the original source exception to the public disclosure bar of the FCA *qui tam* provisions.<sup>22</sup>

## II. EXAMINING THE FALSE CLAIMS ACT BACKGROUND

### A. *The False Claims Act*

The False Claims Act “is the government’s primary litigative tool for the recovery of losses sustained as the result of fraud against the government.”<sup>23</sup> The FCA requires a person or company that knowingly submits false statements or claims under any federal contract or program to repay three times the amount of funds wrongfully obtained, plus civil penalties of up to \$10,000 for each false claim.<sup>24</sup> In short, the FCA is designed not only to deter companies from cheating the government in the first place, but hit them hard in the pocketbook if they do or attempt to do so.<sup>25</sup>

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20. See *infra* Section III.C–D.

21. See *infra* Section III.D.2.d, E–F.

22. See *infra* Section IV. This article restates the law, but does not attempt to apply it to the facts of the *Rockwell* case.

23. *Avco Corp. v. U.S. Dep’t of Justice*, 884 F.2d 621, 622 (D.C. Cir. 1989).

24. 31 U.S.C. § 3729(a) (2000). The statutory penalties are adjusted upward for inflation under the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 (2000). The penalty is currently \$5,500 to \$11,000. See 28 C.F.R. § 85.3(a)(9) (2002).

25. Actually, the FCA treble damage provision (31 U.S.C. § 3729(a)) is remedial in nature, as it is designed to make the government whole. For instance, the treble damages not only recoup the loss, but compensate for investigative costs, the relator’s share of the recovery, and the loss of the use of the funds. In addition, because there is a scienter requirement and other difficulties in proving fraud-based claims, the government often forgoes pursuing certain claims or seeks less than single damages prior to trebling. In addition, by the very nature of concealment, the government may not uncover the full extent of the fraud. Thus, treble damages

The FCA includes several *qui tam* provisions, which permit private parties to file and participate in FCA *qui tam* lawsuits on behalf of the United States and share in the government's recovery.<sup>26</sup> Since the 1986 FCA amendments added the original source exception, the Department of Justice (DOJ)<sup>27</sup> has paid out more than \$1.5 billion in *qui tam* rewards, netting the government more than \$15 billion<sup>28</sup> from companies submitting false claims under federal contracts and programs.<sup>29</sup> Without the help of relators, the government would lose more than one billion dollars per year because 70 percent of all government civil fraud recoveries are from *qui tam* cases.<sup>30</sup>

### B. The Public Disclosure Bar and Original Source Exception

The FCA was first enacted in 1863 during the Civil War, in an effort to address the rampant fraud against the military during war time.<sup>31</sup> When seeking

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should be considered a rough substitute for the actual injury to the public fisc. The Supreme Court has explained that the FCA's treble damages provision was not completely punitive, given the *qui tam* nature of FCA actions, i.e. the government might have to remit up to 30 percent of its damage award to private plaintiffs, and the FCA contains no provision for interest. *Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 131 (2003). In addressing a RICO case, the Supreme Court noted that the treble damage provision was remedial, not punitive. *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406 (2003) ("Indeed, we have repeatedly acknowledged that the treble-damages provision contained in RICO itself is remedial in nature. In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 151, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987), we stated that '[b]oth RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees.' (Emphasis added.) And in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 241, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) we took note of the 'remedial function' of RICO's treble-damages provision.").

26. 31 U.S.C. § 3730(d). The United States is the victim of the fraud, and the real party in interest. The government is allowed an opportunity to elect to intervene in the case or decline and allow the relator to proceed. *Id.* at § 3730(a)–(e).

27. The Civil Fraud Section of the Department of Justice in Washington D.C. is charged with administering the *qui tam* program. The handling of specific FCA cases is a joint effort between the Civil Fraud Section and the local United States Attorney's Offices. Often, the two offices combine forces and jointly work on particular *qui tam* cases. Today, the bulk of all government civil fraud cases are *qui tams*.

28. *See supra* note 8.

29. The False Claims Act applies to any situation where a person or company makes a false statement or false claim to receive federal funds to which it is not entitled. It includes moneys received under contracts, grants, or programs, such as Medicare and Medicaid. In short, the FCA applies to every single federal agency.

30. Of the \$15 billion in fraud recoveries, more than \$10 billion were from *qui tam* cases. *See supra* note 8.

31. The following cases discuss the historical background: *United States ex rel. S. Prawer*

solutions to a national problem, Congress decided it needed the help of private individuals reporting fraud. The rationale underlying the *qui tam* reward program was the notion that the best way to catch a thief is to reward an associate for betraying a confidence.<sup>32</sup> In other words, it is “setting a rogue to catch a rogue.”<sup>33</sup> Thus, a reward mechanism was built into the FCA wherein private persons could sue as relators, representing the government’s interests and receive a bounty from the damages they recovered for the government.<sup>34</sup>

In 1943, there was a turning point in FCA history. Because the original FCA did not contain a vehicle for restricting suits based solely upon information in the public domain, some parasitic individuals began a practice of filing *qui tam* suits mirroring what the DOJ was already pursuing without having any firsthand knowledge of the misconduct. The issue of whether a purely parasitic suit was permitted under the statute was the main issue in *Marcus v. Hess*.<sup>35</sup> In that case, the Supreme Court held that the plain language of the FCA did not bar a person from relying upon criminal indictments as the sole basis for filing a *qui tam*.<sup>36</sup> In other words, a person could simply read the newspaper and find out that the government indicted a company for fraud, and then go to the courthouse and copy the indictment. The relator would be allowed to take the information from the indictment and use it as the sole basis for a FCA *qui tam* suit. In reaction to this decision, in 1943, Congress amended the FCA to include a “government knowledge bar.”<sup>37</sup>

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& Co. v. Fleet Banks of Maine, 24 F.3d 320, 324–26 (1st Cir. 1994); United States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 649–51 (D.C. Cir. 1994); United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1496–98 (11th Cir. 1991); United States ex rel. Minn. Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1041–42 (8th Cir. 2002).

32. Actually, the mechanism for using *qui tam* provisions had been used in England for hundreds of years prior to the 1863 FCA and was adopted in other setting in the early history of the United States. See Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341–42 (1989).

33. United States ex rel. Foulds v. Texas Tech Univ., 171 F.3d 279, 293 (5th Cir. 1999).

34. *Minn. Ass’n of Nurse Anesthetists*, 276 F.3d at 1041. See also *supra* note 31.

35. United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943).

36. *Id.* at 545.

37. The FCA was amended in 1943 “to provide that there would be no jurisdiction over *qui tam* suits “whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.” *Minn. Ass’n of Nurse Anesthetists*, 276 F.3d at 1039 (citing 31 U.S.C. § 232(C) (1946); S. Rep. No. 99-345, at 12)). “The provision was explained as an attempt to curtail parasitical suits in which the informer ‘rendered no service’ to the government.” *Id.* at 1041 (citing 89 Cong. Rec. 10846 (1943)).

According to the courts, this new provision created a complete bar to all *qui tam* suits where any information about the fraud was already somewhere in the possession of the government.<sup>38</sup> For instance, in another watershed case, the Seventh Circuit in *Wisconsin v. Dean* barred the State of Wisconsin from bringing a *qui tam* suit based on Medicaid fraud which it had disclosed to the federal government.<sup>39</sup> In *Dean*, the Seventh Circuit ruled that the 1943 amendments to the FCA barred the *qui tam* suit, notwithstanding that it was the State who reported the matter to the federal government.<sup>40</sup> The relator was barred because it filed suit after the federal government was told of the fraud allegations.<sup>41</sup>

The government knowledge bar, as interpreted by the courts, proved too high a hurdle to sustain a goal of inviting private citizens to join together with the government in combating fraud. In 1986, largely in reaction to *Dean*, Congress deleted the government knowledge bar, replacing it with the current the “public disclosure bar.”<sup>42</sup> The public disclosure bar, however, was not open-ended. Rather, Congress enumerated the specific ways in which it would apply.<sup>43</sup> To avoid repeating the same mistake of closing the door too tightly, however, Congress added an “original source exception.”<sup>44</sup> Thus, even where there had been a “public disclosure” of the fraud in a manner prescribed by the statute, a person holding valuable information could still recover a reward by meeting the FCA definition of an “original source.”<sup>45</sup> In short, the public disclosure does not apply in the first instance if the *qui tam* suit is not considered “based upon” the public disclosure, and a relator is exempted from the bar (in instances where it applies) if they meet the definition of an “original source.”<sup>46</sup>

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38. *Id.*

39. United States ex rel. Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984).

40. *Id.* at 1104–07.

41. *Id.*

42. Courts have frequently stated that the 1986 amendments were in reaction to *Dean*. See *Minn. Ass’n of Nurse Anesthetists*, 276 F.3d at 1041. See also 31 U.S.C. § 3730(e)(4)(A) (containing the public disclosure bar). The legislative history also points out that fraud had been steadily increasing, and there was an increased need of courting private citizens in fighting fraud. See Legislative History, PL 99-562, October 27, 1986, 100 Stat 3153, at pp. 1–4 (listing statistics, stating that the amount of fraud ranges from \$10 to \$100 billion per year, and that “[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.”).

43. See 31 U.S.C. § 3730(e)(4)(A)–(B).

44. *Id.* at § 3730(e)(4)(B) (containing the original source exception).

45. *Id.*

46. *Id.*



## III. ANALYZING THE LAW

A. *An Overview of the Federal Claims Act*

The FCA consists of five separate sections, each containing important subparts and substantive provisions. Before analyzing the public disclosure bar and original source exception, it is important to view them in context of the whole statute. The FCA begins with § 3729, which defines the substantive violation of the law prohibiting parties from knowingly submitting false claims to the government.<sup>47</sup> Next, § 3730 permits private persons to file and participate in *qui tam* lawsuits on behalf of the government and share in the recovery as a reward.<sup>48</sup> In addition, §§ 3731–3733 set forth certain procedures governing the FCA, including the statute of limitations and procedures for the government obtaining documents and testimony during its investigation.<sup>49</sup>

The key *qui tam* provisions are located in § 3730. Care, however, must be taken not to simply lump together its various subparts. While it is important to appreciate the relationship between the various portions because each has unique functions, maintaining a proper distinction is vital for properly interpreting and applying the statute. The beginning point is § 3730(b), which establishes the right of private parties to bring a FCA lawsuit against those

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47. *Id.* at § 3729(a). The text reads: “(a) Liability for certain acts. Any person who (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt; (5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .”

48. *Id.* at § 3730.

49. *Id.* at §§ 3731–3733.

violating the FCA's substantive law provisions.<sup>50</sup> In short, § 3730(b) creates the substantive rights of *qui tam* plaintiffs, which courts must not disturb unless specifically limited by another section of the statute.

Next, § 3730(c) addresses the relationships between the *qui tam* relator and the government, including the role of the government in *qui tam* cases.<sup>51</sup> It also addresses the relator's right to participate in a case whether the government intervenes or declines to participate.<sup>52</sup> For instance, unless the government shows good cause, the relator is a joint participant in cases where the government intervenes.<sup>53</sup> The FCA also gives the relator the right to move forward with the action even if the government declines.<sup>54</sup>

Section § 3730(d) provides awards to successful *qui tam* plaintiffs.<sup>55</sup> It contains three differing categories, each with graduating ranges of amount of awards, together with separate requirements for obtaining the amount of rewards within such categories.<sup>56</sup> For instance, one of the most common situations is governed by § 3730(d)(1), which provides that if the government joins in the *qui tam* lawsuit, the relator is entitled to a reward ranging between 15 and 25 percent of the recovery, depending upon the contribution of the relator.<sup>57</sup> That subpart, however, also establishes a different reward scale for a *qui tam* lawsuit "based primarily" upon certain public disclosures.<sup>58</sup> In such

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50. *Id.* at § 3730(b). See *supra* note 47 for the general language of the FCA substantive violations.

51. *Id.* at § 3730(c).

52. *Id.* at § 3730(c)(1)–(3).

53. *Id.* at § 3730(c)(2)(C)–(D).

54. *Id.* at § 3730(c)(3). Actually, there was a defect in the original *qui tam* provisions, because it did not allow for a partnership of the government and relator. See *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 342 (6th Cir. 2000) ("Although Congress enacted the original FCA in 1863, it did not grant the government any intervention authority until the statute was amended in 1943, see Pub. L. No. 78-213, ch. 377, 57 Stat. 608 (1943)"); *United States ex rel. Roby v. Boeing Co.*, 79 F.Supp.2d 877, 883 (S.D. Ohio 1999) ("The original version of the FCA allowed anyone to bring a *qui tam* action and receive up to fifty percent (50%) of the amount recovered. S. Rep. No. 99-345, at 8–10 (1986)."). Under the 1986 amendments, however, a true partnership takes place. If the government intervenes, the relator continues to participate, earning between 15 and 25 percent of the recovery. *Id.* at § 3730(d)(1). If the government chooses not to intervene, the relator proceeds alone, earning 25 to 30 percent. *Id.* at § 3730(d)(2).

55. 31 U.S.C. § 3730(d).

56. *Id.* at § 3730(d)(1)–(2).

57. *Id.* at § 3730(d)(1).

58. *Id.*

instances, the relator receives between zero and 10 percent, based upon the significance of the information and their role in the case.<sup>59</sup>

Another subpart, § 3730(d)(2), is devoted to situations where the government declines to intervene in the case and the private party successfully proceeds with the lawsuit.<sup>60</sup> The private party receives between 25 and 30 percent of the recovery.<sup>61</sup> The statute provides the court with authority to set an amount within this range using a “reasonableness” standard.<sup>62</sup>

Section 3730(e) bars certain *qui tam* actions by private citizens.<sup>63</sup> It is generally referred to as the “public disclosure bar.”<sup>64</sup> This prohibition, however, has two important requirements for its application and one significant exception. First, the public disclosure bar applies only if there has been a public disclosure of the allegations in one of the enumerated ways listed in the statute itself.<sup>65</sup> The second requirement is that the *qui tam* complaint itself must be determined by a court to be “based upon” such public disclosure.<sup>66</sup> If both of these requirements are met, however, a relator who is an original source may still pursue the case.

The “original source exception” to the public disclosure bar is found in the next subpart, § 3730(e)(4)(B).<sup>67</sup> In short, even where the public disclosure bar applies, the FCA permits a relator to continue if the relator has “direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action.”<sup>68</sup>

Before addressing the particular requirements of these *qui tam* provisions, the author reminds the courts to guard against lumping together the purposes or

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59. *Id.*

60. *Id.* at § 3730(d)(2).

61. *Id.* Another provision of this subpart acts to limit recovery where the private party initiated the fraud in the first place. *Id.* at § 3730(d)(5).

62. *Id.* at § 3730(d)(2).

63. *Id.* at § 3730(e)(4)(A).

64. *Id.* In addition, section 3730(e)(1)–(3) prohibits certain actions, such as suits by military members against other military members, suits against Congress and other officials, or a *qui tam* suit if the government has already filed a *qui tam* suit.

65. The statute limits the definition of public disclosure to the following ways: “in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media.” *Id.* § 3730(e)(4)(A). In short, unless the public disclosure fits one of these categories, the public disclosure bar does not apply.

66. *Id.* See *infra* note 89 addressing the meaning of the term “based upon.”

67. *Id.* at § 3730(e)(4)(B).

68. *Id.*

meaning of the *qui tam* provisions. Again, because each *qui tam* subpart has different functions, it is important that courts separately examine each segment. For instance, there is danger in summarizing the statute as containing “dual goals of encouraging whistle-blowers while discouraging parasitic suit[s].”<sup>69</sup> There are many problems with such broad statements. First, the *qui tam* statute is not limited to “whistleblowers” and there is no requirement that a relator be an “insider” or ever have even worked for the wrongdoer.<sup>70</sup> In addition, outside of the parameters of the public disclosure bar setting, the FCA does not limit a *qui tam* complaint unless a FCA suit has already been filed by the government<sup>71</sup> or another relator.<sup>72</sup> Moreover, the statute does not address “parasitic” behavior in most instances, and it has no place under the statute unless the “public disclosure bar” has been triggered. In short, precision is very important when analyzing the ability of a relator to file a *qui tam* suit, determining which range of recovery they are entitled, and whether a certain prohibition or exception applies.<sup>73</sup>

#### B. The Public Disclosure Bar

The public disclosure bar stems from the following language of the FCA:

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an *original source* of the information.

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69. United States ex rel. Waris v. Staff Builders, Inc., No. 96-1969, 1999 WL 788766, at \*7 (E.D. Pa. Oct. 4, 1999).

70. A relator need not be an insider at all in order to qualify as an original source. United States ex rel. Kennard v. Comstock Res., Inc., 363 F.3d 1039, 1045–46 (10th Cir. 2004).

71. 31 U.S.C. § 3730 (e)(3).

72. *Id.* at § 3730 (b)(5). The FCA also bars other rare situations, such as potential actions by armed forces members against other armed forces members, *id.* at § 3730(e)(1), certain potential actions against Congress, the judiciary, or senior executive branch officials, *id.* at § 3730 (e)(2)(A)–(B), or if the relator is convicted of a crime relating to the fraud allegations in the *qui tam* complaint, *id.* at § 3730(d)(3).

73. Because the case before the Supreme Court involves the “original source exception,” the thrust of this article is defining the proper interpretation of that subpart within the context of the entire statute.

(B) For purposes of this paragraph, “*original source*” means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.<sup>74</sup>

While the standard is plainly stated, its application has proved challenging. The circuits have varied slightly in approach, as will be explored throughout this article. Under this statutory scheme, if there are no public disclosures of the type enumerated in the FCA, the public disclosure bar does not apply, and the original source exception is not implicated.<sup>75</sup> In other words, a relator need only establish that he is an original source if there was a public disclosure of the type enumerated in the statute.

The reason the FCA today includes a “public disclosure bar” is to limit purely parasitic *qui tam* suits in certain situations, like those that prompted the 1943 FCA amendments adding the “government knowledge bar.”<sup>76</sup> The reason the 1986 FCA amendments replaced the government knowledge bar with the public disclosure bar and its “original source exception” is because not everyone who files after a public disclosure is a parasite and in recognition that the 1943 amendment closed the door too tightly.

The courts have established a variety of ways of analyzing whether relators are barred under the public disclosure bar or if they meet the original source exception. While the standards are not in complete harmony, each court at least begins by outlining its framework for evaluating the public disclosure bar. Below are the various frameworks used by the circuit courts of appeals and an analysis of the standards.

A few circuit courts simply restate the FCA language and begin applying the facts to determine if the relator is an original source.<sup>77</sup> Most circuit courts,

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74. 31 U.S.C. § 3730(e)(4)(A)–(B) (emphasis added).

75. *E.g.*, *United States ex rel. Aflatooni v. Kitsap Physicians Services*, 163 F.3d 516, 524 (9th Cir. 1998) (citing *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992)).

76. *See supra* note 28.

77. According to the First Circuit, “An FCA *qui tam* action may not be based on publicly disclosed information unless the relator is the original source of that information. [31 U.S.C.] § 3730(e)(4)(a).” *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 225 (1st Cir. 2004). The Second Circuit states with equal conciseness, “Under the False Claims Act, a private party may maintain a *qui tam* action based on publicly disclosed allegations of fraud or fraudulent transactions only if the party qualifies as ‘an original source of th[is] information.’ 31 U.S.C. § 3730(e)(4)(A).” *United States v. New York Med. Coll.*, 252 F.3d 118, 120 (2nd Cir. 2001). The Third Circuit more broadly identifies the standard, as follows: “The

however, begin by recognizing that a relator need not establish that he is an original source, unless there is a finding that the complaint is based upon a public disclosure of the allegations or transactions in one of the manners enumerated in the statute. These courts apply a gateway analysis,<sup>78</sup> frequently using a two-,<sup>79</sup> three-,<sup>80</sup> or four-<sup>81</sup> prong approach for jointly evaluating the

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jurisdictional bar provision operates to exclude *qui tam* actions based upon allegations of fraud or fraudulent transactions that have been publicly disclosed prior to their filing. The provision was ‘designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator.’ *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1155–56 (3rd Cir. 1991). This provision does, however, contain a ‘savings clause,’ preserving suits brought by an ‘original source’ of the information even where there have been prior public disclosures.” *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 332 (3rd Cir. 2005).

78. The Sixth Circuit uses a series of gateway questions: “In determining whether the jurisdictional bar of § 3730(e)(4) applies to a relator’s case, we consider: ‘(A) whether there has been a public disclosure; (B) of the allegations or transactions that form the basis of the relator’s complaint; and (C) whether the relator’s action is ‘based upon’ the publicly disclosed allegations or transactions.’ If the answer is ‘no’ to any of these questions, the inquiry ends, and the *qui tam* action may proceed; however, if the answer to each of the above questions is ‘yes,’ then we must determine whether the relator nonetheless qualifies as an ‘original source’ under § 3730(e)(4)(B), in which case the suit may proceed.” *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 974 (6th Cir. 2005) (citations omitted).

79. The Seventh Circuit adopts a method of asking just two questions, “To determine whether a relator has the right to bring a suit, we first look to two questions: Was the information on which his allegations are based ‘publicly disclosed’ and, if so, is the suit based on the publicly disclosed information. If not, he avoids the public disclosure bar. However, even if his suit is based on public information, he can still proceed if he is an ‘original source’ of the information.” *United States v. Emergency Medical Associates of Illinois, Inc.*, 436 F.3d 726, 728 (7th Cir. 2006). According to the D.C. Circuit, “Under the FCA, a private party may bring suit for fraud committed against the United States. The ability to bring such actions is limited by the ‘public disclosure’ provision of the Act, which divests courts of jurisdiction over claims ‘based upon the public disclosure of allegations or transactions’ in specified types of public proceedings, ‘unless . . . the person bringing the action is an original source of the information.’ 31 U.S.C. § 3730(e)(4)(A). . . . This creates a two-step process in which a court decides whether the action is based on publicly disclosed information, and if so, whether the plaintiff may still proceed because he is an original source of that information.” *United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 915 (D.C. Cir. 1999).

80. The Fourth Circuit states: “Dismissal of this suit was proper if the *qui tam* complaint was 1) ‘based upon’ information 2) that was ‘publicly disclosed’ and 3) [relators] were not the ‘original source’ of this information.” *Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 582 (4th Cir. 2000). The Fifth Circuit asks: ““(1) whether there has been a ‘public disclosure’ of allegations or transactions, (2) whether the *qui tam* action is ‘based upon’ such publicly disclosed allegations, and (3) if so, whether the relator is the ‘original source’ of the information.”” *United States ex rel. Reagan v. East Texas Med. Ctr. Reg. Sys.*, 384 F.3d 168

public disclosure bar and original source exception. For instance, the Eleventh Circuit uses the following standard:

A three part inquiry determines if jurisdiction exists: (1) have the allegations made by the plaintiff been publicly disclosed; (2) if so, is the disclosed information the basis of the plaintiff's suit; (3) if yes, is the plaintiff an 'original source' of that information. . . . A court reaches the *original source* question only if it finds the plaintiff's suit is based on information publicly disclosed.<sup>82</sup>

Each of the standards used by the circuits are designed to reach the same conclusions: (1) Was there a qualifying "public disclosure" under the Act? If so, (2) Was the *qui tam* "based upon" the public disclosure? If so, (3) Was the relator an "original source"? Although the widely varied frameworks used by the circuits for evaluating whether the public disclosure bar applies appear capable of reaching similar conclusions, there is an opportunity in *Rockwell* for the Supreme Court to pronounce a uniform standard. The need for a single-standard framework addressing the public disclosure bar is heightened by the fact that the circuits also apply widely varying approaches to the specific application of the original source exception, as shown below.

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(5th Cir. 2004) (citations omitted).

81. According to the Tenth Circuit, "The jurisdictional inquiry under 31 U.S.C. § 3730(e)(4)(A) & (B) requires a four-step analysis: (1) whether the alleged 'public disclosure' contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made 'public' within the meaning of the False Claims Act; (3) whether the relator's complaint is 'based upon' this public disclosure; and, if so, (4) whether the relator qualifies as an 'original source.' . . . A court should address the first three public disclosure issues first. Consideration of the fourth, 'original source' issue is necessary only if the court answers the first three questions in the affirmative." *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1048–49 (10th Cir. 2004) (citations omitted). The Eight Circuit states, "The circuits also agree that the jurisdictional inquiry turns on four questions: (1) whether the alleged 'public disclosure' [was made by or in] one of the listed sources; (2) whether the alleged disclosure has been made 'public' within the meaning of the FCA; (3) whether the relator's complaint is 'based upon' this 'public disclosure'; and if so, (4) whether the relator qualifies as an 'original source' under § 3730(e)(4)(B)." *Hays v. Hoffman*, 325 F.3d 982, 990 (8th Cir. 2003) (citing *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1203 (10th Cir. 2003) (en banc)). In a prior decision, however, the Eight Circuit stated the test as asking three questions: "Applying the section requires us to answer three questions: (1) Have allegations made by the relator been 'publicly disclosed' before the *qui tam* suit was brought? (2) If so, is the *qui tam* suit 'based upon' the public disclosure? and (3) If so, was the relator an 'original source' of the information on which the allegations were based?" *U.S. ex rel. Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1042 (8th Cir. 2002).

82. *United States ex rel. Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 565, 565 n.4 (11th Cir. 1994) (citations omitted).

### C. *The Original Source Exception*

Once a court determines that the *qui tam* is based upon a qualifying public disclosure, the court then turns its attention to the original source exception. As with the public disclosure analysis, the circuits vary widely in their approach for establishing a framework to follow for the original source exception.

A few circuits follow a simple approach of identifying the few essential elements of the original source exception. For instance, the Fourth Circuit states, “[relators] are an ‘original source’ if they have ‘direct and independent knowledge of the information on which the allegations are based and ha[ve] voluntarily provided the information to the Government before filing [suit].”<sup>83</sup>

Other circuits set forth either a two-<sup>84</sup> or three-<sup>85</sup> part test for measuring the original source prong. The basic difference is whether the phrase “direct and independent knowledge” is broken into two discrete components when defining the phrase.

The two-step framework is the better approach, giving meaning to each word in the statute. In fact, virtually all courts have attempted to provide meaning to both words “direct” and “independent.”<sup>86</sup> Although a few courts still treat the

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83. *Grayson*, 221 F.3d at 583. The Tenth Circuit approaches this standard with equal simplicity: “In the final step of the analysis, we look to § 3730(e)(4)(B), requiring an original source to have ‘direct and independent knowledge of the information on which the allegations are based’ and to have ‘voluntarily provided the information to the Government’ prior to filing suit.” *Grynberg*, 389 F.3d at 1052. The Eighth Circuit provides a longer description of the process, “In the 1986 amendments, Congress defined ‘original source’ as ‘an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action . . . based on the information.’ § 3730(e)(4)(B). Thus, the original source doctrine limits the rewards of a *qui tam* action to one who has direct knowledge of the alleged false claims that is independent of the public disclosure, and who has functioned as a true whistleblower by volunteering his direct and independent knowledge to the government before filing suit. ‘A whistleblower sounds the alarm; he does not echo it.’ *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1475 (9th Cir. 1996) (quotation omitted), cert. denied, 519 U.S. 865 (1996).” *Hays*, 325 F.3d at 988.

84. According to the Fifth Circuit, “The ‘original source’ exception explicitly requires the satisfaction of a two-part test: ‘(1) the relator must demonstrate that he or she has ‘direct and independent knowledge of the information on which the allegations are based’ and (2) the relator must demonstrate that he or she has ‘voluntarily provided the information to the Government before filing’ his or her *qui tam* action.” *Reagan*, 384 F.3d at 177.

85. The Third Circuit stated, “to be an original source he must have had (1) direct and (2) independent knowledge of the information on which the allegations are based and (3) have voluntarily information to the Government before filing the action.” *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 335 (3rd Cir. 2005).

86. *E.g.*, *United States ex rel. Laird v. Lockheed Martin Eng’g & Sci. Servs., Co.*, 336 F.3d



language “direct and independent knowledge” as a single phrase, when those courts actually apply it, they end up giving meaning to both words, direct and independent.<sup>87</sup>

In short, regardless of the identified standard, the circuits, while not always speaking in terms of three prongs, actually apply a three-part test. They give separate definitions for “direct” knowledge and “independent” knowledge, followed by adding a third requirement that the information be voluntarily provided to the government prior to filing the *qui tam* complaint.

In sum, given the widely varied approaches used by the circuits, the author restates the standard by establishing a decisional tree, labeled “*Public Disclosure Bar Analysis*.” This standard unifies and simplifies the varying approaches being used by the circuits in outlining both the public disclosure bar and original source exception. It also helps ensure uniform decisions.

### 1. *Public Disclosure Bar Analysis*

The public disclosure bar and original source exception are properly evaluated using the following decisional tree:

1. Was there a recognized “public disclosure” under the FCA?<sup>88</sup>  
*If yes*, go to 2. *If no*, end of inquiry. The relator may proceed.
2. Was the *qui tam* “based upon” the public disclosure?<sup>89</sup>

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346, 354 (5th Cir. 2003) (direct and independent are two discrete and necessary concepts); *Minn. Ass’n of Nurse Anesthetists*, 276 F.3d at 1048 (direct and independent expresses two ideas, not one).

87. *E.g.*, *United States ex rel. Stone v. Rockwell Int’l Corp.*, 92 F. App’x 708, 720 (10th Cir. 2004) (addressing the language as a single phrase).

88. The FCA spells out the precise sources of public disclosures that trigger the public disclosure bar. *See* 31 U.S.C. § 3730(e)(4)(A). This article does not fully explore the differences in approaches used by the courts in addressing this prong.

89. The term “based upon” has generated litigation and diverging definitions. The Third Circuit analyzed the varying views. *See United States ex rel. Paranich*, 396 F.3d at 334–35 (“We have held, consistent with the majority of our sister courts of appeals, that the term ‘based upon’ means ‘supported by’ or ‘substantially similar to,’ not ‘actually derived from.’ *Mistick*, 186 F.3d at 385-88; *accord United States ex rel. Biddle v. Bd. of Trs. of the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 537–40 (9th Cir. 1998); *United States ex rel. Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 682–84 (D.C. Cir. 1997); *Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 567 (11th Cir. 1994); *Koch Indus.*, 971 F.2d at 552; *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2nd Cir. 1992). *But see United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999) (holding that “based upon” means actually derived from); *United States ex rel. Siller v. Becton Dickinson & Co. By and Through Microbiology Systems Div.*, 21 F.3d 1339, 1348 (4th Cir. 1994) (holding that ‘based upon’ means actually derived from). Furthermore, we have held that ‘a *qui tam* action is “based upon”

- If yes, go to 3. If no, end of inquiry. The relator may proceed.*
3. Was the relator an “original source” of the information in his complaint that supports an essential element of the FCA cause of action?
- A. Did the relator have “direct” knowledge of such information?  
*If yes, go to 3B. If no, end of inquiry. The relator may not proceed.*
- B. Did the relator have “independent” knowledge of such information?  
*If yes, go to 3C. If no, end of inquiry. The relator may not proceed.*
- C. Did the relator “voluntarily provide” such information to the government prior to filing the *qui tam* suit?<sup>90</sup>  
*If yes, the relator may proceed. If no, the relator may not proceed.*

As depicted by this decisional tree, the public disclosure bar applies only if two separate events occur, viz., there was a qualifying public disclosure and the *qui tam* was based upon it. The tree also outlines how to determine whether a relator qualified for the original source exception. The remainder of this Article focuses on the third question of this decisional tree, the application of the original source exception, which is in great need for the Supreme Court to set a single standard.

Assuming that a finding has been made that the complaint is based upon a qualifying public disclosure, the first two decisions a court must make under the *Public Disclosure Bar Analysis* relating to the “original source” prong is whether the relator has “direct knowledge” and “independent knowledge.” The

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a qualifying disclosure if the disclosure sets out either the allegations advanced in the *qui tam* action or all of the essential elements of the *qui tam* action’s claims.’ *Mistick*, 186 F.3d at 388.”). This article does not fully explore the differences in approaches used by the courts in addressing this prong.

90. The courts apply varying approaches to the “voluntary provided” prong. Two circuits require that the relator must have had a hand in the public disclosure. The courts also vary as to what type of disclosures are purely voluntary or compelled actions, and a few circuits require a relator to have actually provided the information to the government prior to the public disclosure. *See United States ex rel. Zaretsky v. Johnson Controls, Inc.*, 457 F.3d 1009, 1013–18 (9th Cir. 2006) (discussing issue and noting that the Sixth and Eighth Circuits require that a relator provide relevant information to the government prior to the public disclosure, while the Second and Ninth Circuits instead require the relator to have played a role in the public disclosure). This article does not fully explore the differences between cases addressing voluntariness.

FCA did not define either the term “direct” or “independent.” The courts, therefore, have assigned themselves to the task of utilizing a variety of differing approaches.

## 2. “Direct” Knowledge

The term “direct” knowledge of the information upon which the allegations are based has been defined in a wide variety of ways by the courts.<sup>91</sup> Two circuits require knowledge “marked by absence of an intervening agency, instrumentality or influence.”<sup>92</sup> Definitions also include requiring that the knowledge be gained from the relator’s own labor, i.e. “knowledge derived from the source without interruption or gained by the relator’s own efforts rather than learned second-hand through the efforts of others.”<sup>93</sup> Similarly, it has been held to mean “unmediated by anything but the plaintiff’s own labor.”<sup>94</sup> Virtually all courts treat “direct” as meaning “firsthand” knowledge, which some interpret as something the relator sees with his own eyes.<sup>95</sup>

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91. See *Laird*, 336 F.3d at 355–56 (listing a number of relevant cases).

92. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 656 (D.C. Cir. 1994); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3rd Cir. 1991).

93. *Laird*, 336 F.3d at 355.

94. *U.S. ex rel. Minn. Ass’n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1048–49 (8th Cir. 2002).

95. *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003) (he “sees it with his own eyes”); *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003) (“[A] person who obtains secondhand information from an individual who has direct knowledge of the alleged fraud does not himself possess direct knowledge and therefore is not an original source.”); *United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000) (“A putative relator’s knowledge is ‘direct’ if he acquired it through his own efforts, without an intervening agency”); *United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) (direct means one cannot learn the information “secondhand”); *United States ex rel. Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) (“In order to be ‘direct,’ the information must be first-hand knowledge.”). The Third Circuit has collected cases describing the standard used by the various courts. See *United States ex rel. Paranych v. Sorgnard*, 396 F.3d 326, 335–36 (3rd Cir. 2005) (“We have interpreted direct to mean ‘marked by absence of an intervening agency, instrumentality, or influence: immediate.’ *Stinson*, 944 F.2d at 1160 (quoting Webster’s Third New International Dictionary 640 (1976)). Other courts have interpreted direct to mean ‘first-hand,’ *Findley*, 105 F.3d at 690, ‘seen with the relator’s own eyes,’ *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992), ‘unmediated by anything but [the relator’s] own labor,’ *id.* See also *Fine*, 99 F.3d at 1547; *Devlin*, 84 F.3d at 360–61, and ‘[b]y the relator’s own efforts, and not by the labors of others, and . . . not derivative of the information of others,’ *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999).”).

The Fifth Circuit, relying upon a plain dictionary definition, concluded that direct means “knowledge derived from the source without interruption or gained by the relator’s own efforts rather than learned second-hand through the efforts of other[s].”<sup>96</sup> This definition best captures the purpose of the section because it succinctly sets forth a standard which distinguishes between someone who directly obtains information from those who receive their information secondhand.<sup>97</sup>

### 3. “Independent” Knowledge

The circuits have similarly applied a variety of meanings to the term “independent.” The term “independent” knowledge of the information upon which the allegations are based has been defined as knowledge not derived from or dependent upon the public disclosure itself.<sup>98</sup> “[I]n other words, [the relator] must be ‘someone who would have learned of the allegation or transactions independently of the public disclosure.’”<sup>99</sup> In addition, “[t]o be independent, the relator’s knowledge must not be derivative of the information of others, even if those others may qualify as original sources.”<sup>100</sup> For instance, a party to litigation who gains information during that case lacks independent knowledge of the misconduct.<sup>101</sup> In these types of situations, the relator’s knowledge is dependent upon or gained from the publicly disclosed information.<sup>102</sup>

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96. *Laird*, 336 F.3d at 355–56 (citing Webster’s New International Dictionary 640 (3rd ed. 1961)).

97. The purpose of setting a single standard is to provide guidance to the courts and foster uniform decisions. This definition best captures the meaning of the various ways of defining the term “direct.” However, the author is not stating that each of the ways the federal circuits have defined the term “direct” are wrong or necessarily lead to inconsistent results.

98. See *Paranich*, 396 F.3d at 336–37 (“We have interpreted this requirement to mean that knowledge of the fraud cannot be merely dependent on a public disclosure.”); *Minn. Ass’n of Nurse Anesthetists*, 276 F.3d at 1048 (independent knowledge means knowledge “not derived from the public disclosure”); *Findley*, 105 F.3d at 690 (“In order to be ‘independent,’ the information known by the relator cannot depend or rely on the public disclosures.”); *Wang*, 975 F.2d at 1417.

99. *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 497 (7th Cir. 2003).

100. *Hays*, 325 F.3d at 991 (quoting *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1007 (10th Cir. 1996)).

101. *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853, 864 (7th Cir. 1999); *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1159 (2nd Cir. 1993) (information obtained through civil discovery).

102. Some courts have held that the relator’s background knowledge of a company or use of

The best definition of “independent” is knowledge not derived from or dependent upon the public disclosure itself.<sup>103</sup> Otherwise, if it were sufficient for a relator’s knowledge of the information forming the basis for his allegation of an FCA violation to be derived from or dependent upon the public disclosure, then it would signal a retreat back to the days of *Hess*, where an individual could simply mirror a criminal complaint.<sup>104</sup> In other words, under the author’s restatement, even if a person claims that his knowledge gained through reading an indictment gave him “direct” knowledge, he could not be credited with “independent” knowledge because he *derived* the information from the public disclosure.

In sum, the original source exception requires that a relator satisfy both direct and independent knowledge. The text of the statute and purposes of the original source exception are met by the author’s restatement of these terms, defining “direct knowledge” to mean derived from the source without interruption or gained by the relator’s own efforts rather than learned second-hand through the efforts of others, and “independent knowledge” to mean not derived from or dependent upon the public disclosure itself.

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unique expertise in a particular industry to conclude from public documents that a claim must be false does not satisfy gaining the information independent from a public disclosure. *Findley*, 105 F.3d at 688 (“A relator’s ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation have already been publicly disclosed.” . . . “If a relator merely uses his or her unique expertise or training to conclude that the material elements already in the public domain constitute a false claim, then a *qui tam* action cannot proceed.”); *Kreindler*, 985 F.2d at 1159 (“Nor does the fact that [the relator’s] background knowledge enabled it to understand the significance of the information acquired . . . make its knowledge independent of the publicly disclosed information. If that were enough to qualify the relator as an original source then a cryptographer who translated a ciphered document in a public court record would be an original source, an unlikely interpretation of the phrase.”); *Findley*, 105 F.3d at 688 (“[T]he relator must possess substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation.” (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3rd Cir. 1991))).

103. Again, the purpose of setting a single standard for definitions of key terms is to provide guidance to the courts and foster uniform decisions. The author contends that this definition best captures the meaning of the various ways of defining the term “independent.” The author is not stating that each of the ways the federal circuits have defined the term “independent” are wrong or necessarily lead to inconsistent results.

104. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

#### 4. Examples of Direct and Independent Knowledge

Although not exhaustive, below is a sampling of the type of cases where the circuit courts of appeals have held that a relator did *not* meet the direct and independent prongs: (1) the relator simply relied upon a hospital audit for evidence of fraud,<sup>105</sup> (2) several relators gained information through civil discovery,<sup>106</sup> (3) the critical elements of fraud were learned through a FOIA request,<sup>107</sup> (4) the relator learned information from an administrative complaint filed with the FAA,<sup>108</sup> (5) the relator's knowledge was based solely on research and review of public records,<sup>109</sup> (6) the relator failed to come forward with any showing that he had any knowledge independent of the public disclosures,<sup>110</sup> (7) the relator learned key facts from a government employee,<sup>111</sup> (8) the relator learned the information from a government report and during discussions with others,<sup>112</sup> (9) the relator learned of the fraud from a co-worker,<sup>113</sup> and (10) the relator gained the information second-hand from other union members.<sup>114</sup>

By contrast, examples of where the courts of appeals have held that a relator satisfies the direct and independent prongs include: (1) requirement of direct knowledge was satisfied because he participated in the fraudulent billing scheme,<sup>115</sup> (2) the relator provided medical services at one of the relevant schools and attended a meeting where presentations were made by the

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105. United States ex rel. Dhawan v. New York Medical College, 252 F.3d 118, 119 (2nd Cir. 2001).

106. *Kreindler*, 985 F.2d 1148; *Stinson*, 944 F.2d at 1160; United States ex rel. Kinney v. Stoltz, 327 F.3d 671 (8th Cir. 2003) (lacking direct knowledge because it was learned in depositions conducted in a prior *qui tam* action).

107. United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh, 186 F.3d 376 (3rd Cir. 1999).

108. United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc., 221 F.3d 580, 582 (4th Cir. 2000).

109. United States ex rel. Reagan v. East Texas Med. Ctr. Reg. Sys., 384 F.3d 168, 178 (5th Cir. 2004).

110. United States ex rel. Feingold v. Administar Fed., Inc., 324 F.3d 492 (7th Cir. 2003).

111. United States ex rel. Mathews v. Bank of Farmington, 166 F.3d 853 (7th Cir. 1999).

112. United States ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038 (10th Cir. 2004).

113. United States ex rel. Hays v. Hoffman, 325 F.3d 982 (8th Cir. 2003).

114. United States v. Alcan Elec. & Eng'g, Inc., 197 F.3d 1014, 1021 (9th Cir. 1999).

115. United States ex rel. Paranych v. Sorgnard, 396 F.3d 326 (3rd Cir. 2005). Those asked to participate in the fraud are not barred by the FCA, but actually welcome to become a relator. However, if a person planned or initiated the fraud, a court may reduce the award to the zero to ten percent range. 31 U.S.C. § 3730(d)(3). If the relator is convicted of a crime relating to the fraud, they are barred from recovery. *Id.*

defendant,<sup>116</sup> (3) the relator had personal knowledge of the fraud and simply augmented it with a review of public records,<sup>117</sup> (4) the nurse relators spoke to the defendants themselves, saw the records containing the false statements, and participated in the medical procedures,<sup>118</sup> (5) the relator acquired knowledge that his insurance company fraudulently submitted his medical bills to Medicare through three years of his own claims processing and discussions with the defendant and the government regarding the bills,<sup>119</sup> and (6) the relator was the engineer tasked with studying the problem.<sup>120</sup>

*D. The Information on Which the Allegations Are Based*

Under the original source exception within the *Public Disclosure Bar Analysis*, the leading question is: “Was the relator an “original source” of the information in his complaint that supports an essential element of the FCA cause of action?” Although this question precedes the later questions regarding the meaning of direct and independent knowledge in the decisional tree, the Article intentionally addressed them first for two reasons. First, courts often approach the issue in this manner. Second, and more importantly, it helps frame the heart of the issue—what level or amount of particularized information must the relator possess? In fact, determining the meaning of “direct” and “independent” knowledge is part of a broader aspect of defining what information the relator must know firsthand. This is the area of law which is most difficult to decide and where the courts have diverged in a manner requiring the Supreme Court to step in and set a standard.

The FCA states that the relator’s direct and independent knowledge must relate to “the information on which the allegations are based.”<sup>121</sup> Determining the meaning of this phrase requires unraveling two broad questions. First, does the phrase mean information in the *qui tam* complaint or public disclosure?<sup>122</sup> Second, how particularized does the information have to be?

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116. United States ex rel. Barron v. Deloitte & Touche, L.L.P., 106 Fed. Appx. 284, 285 (5th Cir. 2004).

117. United States ex rel. Kennard v. Comstock Res., Inc., 363 F.3d 1039 (10th Cir. 2004).

118. U.S. ex rel. Minn. Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1050 (8th Cir. 2002). This is a case the author worked on.

119. United States ex rel. Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 568 (11th Cir. 1994).

120. United States ex rel. Wang v. FMC Corp., 975 F.2d 1412, 1417 (9th Cir. 1992).

121. 31 U.S.C. § 3730(e)(4)(B). One of the main issues before the Supreme Court in the *Rockwell* case involves the meaning of this phrase.

122. Although the first question is not an issue between the parties in the *Rockwell* case, it is

1. “Information” in the *Qui Tam* Complaint or Public Disclosure?

Although the Fifth Circuit in *Laird*<sup>123</sup> stated that the circuits are split as to the meaning of the statutory phrase “direct and independent knowledge of the information on which the allegations are based,” such an assertion is not a correct reading of the case law.<sup>124</sup> Rather, a relator must possess direct and independent knowledge of a quantum of information contained in his complaint. In fact, to require the relator to have firsthand knowledge of allegations which are not in his *qui tam* complaint, but appear in the media, flies in the face of the text and would frustrate the purpose of the FCA.

In *Laird*, the district court had ruled that the relator could not meet the original source exception because he had not personally seen with his own eyes the invoices the company submitted to the government which formed the technical basis of the false claim.<sup>125</sup> The Fifth Circuit rejected the result, which it blamed upon the district court for incorrectly testing the relator’s direct and independent knowledge against information contained in the complaint as opposed to information in the public disclosure.<sup>126</sup> The Fifth Circuit observed that the district court required the relator to prove he had direct and knowledge of *all* information in the complaint.<sup>127</sup> Because a *qui tam* complaint includes all of the elements of a violation of the FCA, the relator’s complaint necessarily included allegations that the company submitted false invoices for payment.<sup>128</sup>

The Fifth Circuit correctly proclaimed that the original source exception should not “require that a relator have ‘direct’ and ‘independent’ knowledge of

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briefly addressed in this article because the Fifth Circuit claims that there is a circuit split. Moreover, an analysis of the Fifth Circuit case is instructive to addressing the second question, regarding just how much information the relator must know.

123. United States ex rel. *Laird v. Lockheed Martin Eng’g & Sci. Servs., Co.*, 336 F.3d 346, 353 (5th Cir. 2003).

124. United States ex rel. *Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 388–89 (3rd Cir. 1999); United States ex rel. *Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993); United States ex rel. *Hafters v. Spectrum Emergency Care*, 190 F.3d 1156, 1162 (10th Cir. 1999). The language in several other federal circuit cases, however, suggest that a relator must have direct and independent knowledge of the allegation mentioned in the public disclosure. *Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000); United States ex rel. *McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 941–43 (6th Cir. 1997); United States ex rel. *Minn. Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1048 (8th Cir. 2002); United States ex rel. *Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 690 (D.C. Cir. 1997).

125. *Laird*, 336 F.3d at 353.

126. *Id.*

127. *Id.*

128. *Id.*



each false claim alleged in his complaint.”<sup>129</sup> However, the reasoning of the Fifth Circuit was misguided because it turned away from the true issue of what is the extent of knowledge required, and instead sought to avoid the wrong result by requiring the relator to demonstrate that he had firsthand knowledge of the information in the public disclosure.<sup>130</sup> Instead, the Fifth Circuit should have determined that a relator need not possess direct knowledge of *every* fact in the complaint, such as the invoices submitted for payment.<sup>131</sup>

As shown in the next section, the FCA does not require firsthand knowledge of every element or fact contained in a *qui tam* complaint. For purposes of this section, however, the Supreme Court should state that the information upon which the relator’s firsthand knowledge is based on *his* allegations of fraud. A plain reading of the text supports this conclusion, which reads: “an individual who has direct and independent knowledge of the information on which the allegations are based.”<sup>132</sup> The allegations refer to those made by the relator, not to some unspecified person providing information to the media. Moreover, to test a relator’s knowledge upon something not even alleged by him or required to be established to prevail in a FCA lawsuit makes little sense.

## 2. *The Level of Information Required*

Moving beyond the question of whether the focus is upon the relator’s knowledge of information contained in his complaint, the courts must address the second issue: How much direct and independent information must the relator possess to be an original source? In other words, must the relator possess direct and independent knowledge of every fact, a single fact, or something in between?

“Congress did not prescribe the quantum or centrality of nonpublic information that must be in the hands of the *qui tam* relator in order for suits to proceed.”<sup>133</sup> Therefore, the courts must establish an appropriate standard from

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129. *Id.* at 352–53.

130. *Id.* at 355. The Fifth Circuit then remanded the case, requiring the district court to determine if the relator had direct and independent knowledge of the information in the public disclosure.

131. If a relator must have direct and independent knowledge of every publicly disclosed fact, he would not be in much different position than if he must know of every fact in the complaint. For instance, if on remand the district court in *Laird* determines that the media disclosed the mundane fact that as part of the fraudulent scheme it submitted invoices for payment, would not the relator need to have seen the invoices with his own eyes?

132. 31 U.S.C. § 3730(e)(4)(B).

133. *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 653 (D.C. Cir.

examining the text and, as necessary, the intent of the framers of the statute. Without a uniform standard, courts will invariably reach inconsistent results, some of which will be outside the purpose of the statute.

*a. The Plain Meaning of the Statute*

The author restates the phrase “direct and independent knowledge of the information on which the allegations are based” as meaning: *The relator must have direct and independent knowledge of information that supports an essential element of the FCA cause of action.* This is the language truest to the text and purpose of the statute.

The pertinent language of the FCA statute reads: “(B) For purposes of this paragraph, “original source” means an individual who has direct and independent knowledge of *the information on which the allegations are based* and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.”<sup>134</sup>

As a starting point for interpreting statutes, one begins with the plain meaning.<sup>135</sup> Here, the text states that the relator must have knowledge of “the information.” It is important to note that the text does not require knowledge of “all information.” Therefore, it is clear that Congress did not intend for the word “the” to require a relator to know *all* facts pertaining to the alleged fraud. Otherwise, the entire purpose of the statute would be frustrated because there would be very few instances where a relator could meet such a requirement. In fact, not a single court has ever adopted such an interpretation.

On the other hand, the statute *does* use the definite article “the” prior to the term “information.” Therefore, it is also clear that a relator cannot merely know an inconsequential or mundane piece of information. Rather, the mini-phrase “the information” must have some lower and upper limits. The real question is just *how much* information is needed?

The dictionary defines “information” as “knowledge derived from study, experience, or instruction.”<sup>136</sup> By this definition, we see that Congress is

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1994).

134. 31 U.S.C. § 3730(e)(4)(B) (emphasis added).

135. *F.B.I. v. Abramson*, 456 U.S. 615, 638 (1982) (“Of course, while it is elementary that the plain language interpretation of a statute enjoys a robust presumption in its favor, it is also true that Congress cannot, in every instance, be counted on to have said what it meant or to have meant what it said. Statutes, therefore, ‘are not to be construed so strictly as to defeat the obvious intention of the legislature.’”) (citations omitted).

136. *The American Heritage College Dictionary* 698 (1993) (defining information as “knowledge derived from study, experience, or instruction” and “knowledge of a specific event or situation; intelligence.”).

looking for what the relator knows about the fraudulent scheme from study, experience, or instruction. In most instances, the information is what the relator learned by participating in or watching the fraud occur. In fact, the requirement that knowledge of the information be “direct and independent” negates those who can merely say, “I heard that you committed fraud,” or “I have a hunch that you cheated.”

The text of the statute adds at the end of the phrase, “on which the allegations are based.” This phrase can be viewed as accomplishing several things. First, as discussed earlier, it ties the term “knowledge” to what the relator alleges in his complaint, as opposed to needing to have direct and independent knowledge of the allegations being publicly disclosed.

Second, the term “the allegations” provides guidance as to what type of knowledge of information must be firsthand. The provision does not say “all information” or “every piece of information” supporting the fraud allegations. In other words, the relator must know of the allegations of fraud, but not every element of fraud. The question resurfaces: who’s allegation? The answer is clear from the text. It refers to the relator’s allegation of fraud. In other words, the original source exception requires that the relator have firsthand knowledge of the allegation that there is fraud afoot. The relator must have observed some misconduct leading to the conclusion that there is fraud being committed.

Against this backdrop, it is helpful to examine the full text again, which reads: “‘original source’ means an individual who has direct and independent knowledge of the information on which the allegations are based.”<sup>137</sup> With an appreciation for each of the terms, it now becomes apparent that the amount of information needed to be firsthand is enough to support a conclusion that the party is defrauding the federal government. The author argues that the correct restatement of this provision is that the relator must have direct and independent knowledge of information that supports an essential element of the FCA cause of action.<sup>138</sup>

The concluding term in the phrase (“are based”) supports the author’s reading. The term “are based” means that the relator must have some firsthand “basis” for making an “allegation” of fraud. In other words, the relator must possess some direct and independent knowledge of information of the alleged fraud, such that they could proclaim, “I am confident you’re cheating!” This

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137. 31 U.S.C. § 3730(e)(4)(B).

138. The graduating knowledge of the *qui tam* provisions, as discussed in the next subsection, proves this point. It makes clear that relators are expected to have varying ranges of knowledge and that the original source exception cannot be set above the minimum floor of knowledge or it would render the lower ranges superfluous.

phraseology intentionally differs from being able to say on the one extreme, “I absolutely know you’re cheating,” or on the other end, “I suspect you might be cheating.” Unmasking the subtle differences between these three competing choices (“absolute certainty,” “confidence,”<sup>139</sup> and “mere suspicion”) is the key to properly determining the jurisdictional limit of the original source exception.

The D.C. Circuit case of *Springfield* is instructive.<sup>140</sup> It interprets the phrase “the information,” to require direct and independent knowledge “of the underlying allegation, rather than direct and independent knowledge of the ‘transaction’ itself.”<sup>141</sup> The D.C. Circuit reasoned that to equate the word “information” with “transaction” would “undo both Congress’ careful choice of wording and its manifest intent.”<sup>142</sup> In other words, the term “the information” is a function of the necessary information the relator knows regarding the fraudulent scheme. The D.C. Circuit stated that the careful phraseology means that the relator need not know of “*all* of the vital ingredients to a fraudulent transaction,” but rather, “*any* essential element of the underlying fraudulent transaction.”<sup>143</sup> Under this approach, a person who knows of an essential element of the fraud scheme would have a high level of confidence that the company is cheating, without, on the one hand, needing to have absolute certainty of every element of fraud and, on the other hand, not be merely guessing by relying upon hearsay or secondhand information.

If a relator is required to know without any doubt that a company is cheating, a court may be inclined to require that he actually see the false statement or fraudulent instrument, i.e. see the false statement and claim made directly to the government. But, to have direct and independent knowledge to satisfy the accusation “I am confident through my own observations that you are cheating” requires, instead, that the relator possess direct evidence of information that supports an essential element of the FCA cause of action, but not necessarily see the invoice presented or actual fraud statement made to the government. The relator sees enough with his own eyes to boldly assert that he is confident that the defendant is cheating.<sup>144</sup> Of course, mere speculation will not satisfy

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139. Another term, such as “convinced,” could be substituted. The choice of a particular word is not critical. The point being made is that a relator does not need to possess firsthand knowledge of all information contained in the complaint. This demonstrates why a relator need not have personal knowledge of the invoice or false statement itself.

140. *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994).

141. *Id.* at 656

142. *Id.*

143. *Id.* at 656–57 (emphasis added).

144. The typical lay person with this type of personal knowledge of an element of the fraudulent scheme would likely use the words, “I know you are cheating.” The reason that this

the requirement; nor will direct knowledge of mere background information. In fact, the “direct and independent” requirement rounds out the meaning and fulfills the purpose of this aspect of the statute by requiring the relator to directly and independently observe key facts supporting the fraud allegations, and not rely upon speculation or secondhand information.

Consider the following illustrations of the difference between absolutely knowing and being confident through one’s own observation that someone is cheating the federal government. A project manager of a major aerospace company tells the shift manager to substitute to a lower grade of metal than normally used when building certain sections of a military aircraft. He is told that this will help keep the project within budget. The shift manager complies, but later regrets his actions. He knows that it is improper to use that metal on government contracts. Therefore, he tells the president of the company, “We are cheating on the military contract because we used non-conforming metal.” The president asks the employee to support his accusation. The manager explains that he was told to use a low grade metal, which is non-conforming to military specifications. He further states that it is not as strong as the metal the company always uses for those parts. In response, the president asks, “Did you actually see the invoice we submitted? Did you actually see any false statements we made to the government?” The manager says no to both questions, but adds that he knows that you are not supposed to use that type of metal on an aircraft, and that it is wrong to substitute products under government contracts. The president tells him to do his job of building airplanes and leave the material decisions to the project manager and billing issues to the accounting department.

In this illustration, the shift manager had no “knowledge” in the fullest sense that the company submitted false claims to the government, because he did not see the invoice or any accompanying false statement. But he clearly had a reasonable basis to be confident that the company was cheating. His knowledge was also direct and independent because he was personally told to use non-conforming material to save the company money. Therefore, he satisfies the original source exception even though he did not see the invoice or false statement.

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article draws the subtle distinction is to rebuff the argument that one cannot truly “know” for sure without actually seeing the invoice itself. In other words, requiring a person to know every fact in the *qui tam* complaint is the surest way to eliminate any real help from private parties. It would render the original source exception meaningless, and the hurdle would prove even a greater obstacle to enlisting help from citizens than the failed 1943 amendment with its government knowledge bar.

In the second illustration, a hospital administrator gives a memorandum to a coding clerk instructing her to upgrade every Medicare patient whose medical chart indicates a “cold” to the higher paying code of “pneumonia.” Over the course of two years, the coding clerk “upcodes” a thousand common cold procedures. Finally, her conscience is stricken to the point she confronts the hospital administrator for cheating Medicare. She explains that she reviews the medical charts and sees the physicians’ diagnoses for patients, but was told to upcode all “colds” to “pneumonia.” The administrator responds by asking whether she knows if the doctors went back and corrected the charts to add pneumonia? The code clerk admits she does not, but that it would be wrong not to give her the amended charts. The administrator tells her, “Old people always get pneumonia, it just takes time for it to progress.” She adds, “Go about your business, and let the doctors do theirs. Besides, you don’t actually see the bills we submit to Medicare. It is likely that any chart that was not later changed by the doctor was downgraded before the bill was submitted.”

Here, again, the coding clerk might not actually know all of the facts needed to prove every technical element of a FCA claim. The excuses given could even create a slight doubt in the code clerk’s mind. But the company was in fact cheating, and she had reason to be confident in that allegation based upon direct and independent knowledge. The Medicare rules do not permit codes to be altered in the manner suggested in the excuse. While the coding clerk might not actually see the invoices submitted to Medicare, she has personal knowledge that the hospital told her to automatically upcode Medicare patients. She also was one of the individuals inputting codes into the system that formed the basis for billing Medicare. Therefore, the code clerk clearly meets the original source exception. The fact that she did not see the final bill not only lacks importance in proving the fraud scheme, but it is not a requirement imposed by the *qui tam* provisions.

In these two illustrations, the direct involvement with and knowledge of the fraudulent scheme is precisely the type of help to the government the *qui tam* provisions contemplate. Both persons witnessed critical elements of the fraud with their own eyes. Therefore, neither should be barred from bringing a *qui tam* merely because they did not see the actual false statements made to the government. In fact, in most instances, the false statement is merely a standard statement that the company complied with all of the contract specifications, and the false claim is an invoice seeking all costs incurred during the billing cycle. Neither has much value in establishing fraud, but they are technical elements in

proving an FCA claim.<sup>145</sup> To require a relator to see the invoice or false statement would stand the original source exception on its head and impose a hurdle that does nothing more than frustrate the purpose of enlisting private citizens in reporting fraud.<sup>146</sup>

*b. Graduated Knowledge*

Another portion of the *qui tam* provisions provides further support for the author's restatement. The FCA statute graduates the amount of the "relator share" based upon the relator's quantum of knowledge. Specifically, one provision limits the amount of the reward to between zero and 10 percent in cases where the relator's knowledge is "based primarily on disclosures of specific information (other than information provided by the person bringing the action)" in one of several enumerated manners.<sup>147</sup> The key point is that the statute's reward allows for some gradation based in part on graduations in the amount of the relator's knowledge.

The pertinent FCA text reads:

*(d) Award to Qui Tam plaintiff.* (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. *Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or*

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145. At trial, the government would need to introduce the invoices. However, there is nothing on the face of an invoice which would indicate fraud. Instead, it merely claims an amount of money. In addition, the government can readily subpoena invoices. Similarly, the false statement submitted to the government that a company was entitled to payment does not add anything of value in proving fraud. Therefore, to require a relator to see these mundane records would be an exercise in futility.

146. If the courts adopt a requirement of seeing the invoice or false statement seeking payment, a corrupt company can insulate itself from all *qui tam* suits in which the public disclosure bar applies by not allowing any of its employees to see the submissions by the company, beyond the person who initiated the fraud.

147. 31 U.S.C. § 3730(d).

investigation, or from the news media, *the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.* . . .<sup>148</sup>

It is clear that the statute recognizes that the level of direct and independent knowledge of information will vary greatly from relator to relator. In fact, the *qui tam* provisions contemplate that in some instances a relator's *qui tam* complaint will be based "primarily upon" recognized public disclosures.<sup>149</sup> Under those circumstances, the court does not bar the case entirely, but determines an award at an appropriate amount between zero and 10 percent "taking into account *the significance of the information and the role of the person bringing the action in advancing the case to litigation.*"<sup>150</sup>

In an opinion written by current Supreme Court Justice Alito, the Third Circuit examined the meaning of the zero to 10 percent range of awards under the FCA.<sup>151</sup> The Third Circuit determined, "[t]he lesser range (up to 10% of the proceeds) is provided for the (presumably unusual) cases in which an 'original source' relator asserts a claim that is 'primarily based' on information that has been publicly disclosed and that the relator did not provide."<sup>152</sup> The

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148. *Id.* at § 3730(d)(1) (emphasis added).

149. *Id.* at § 3730(d)(1).

150. *Id.* (emphasis added). The *qui tam* provisions also contemplate that in the more typical case, a court will award a relator a graduated share in an intervened case, "depending upon the extent to which the person substantially contributed to the prosecution of the action." *Id.* The court also awards a graduated level of award between 25 and 30 percent if the government declines. *Id.* at § 3730(d)(2) (the court sets this amount based upon what is reasonable).

151. *United States ex rel. Merena v. Smithkline Beecham Corp.*, 205 F.3d 97, 101–06 (3rd Cir. 2000).

152. *Id.* at 106. The Third Circuit quoted the two founders of the statute: "Senator Grassley stated: 'When the *qui tam* plaintiff brings an action based on public information, meaning he is an "original source" within the definition under the act, but the action is based primarily on public information not originally provided by the *qui tam* plaintiff, he is limited to a recovery of not more than 10 percent. In other words a 10-percent cap is placed on those "original sources" who bring cases based on information already publicly disclosed where only an insignificant amount of that information stemmed from that original source.'" 132 Cong. Rec. 28580 (1986) (emphasis added). Similarly, Representative Berman commented: "The only exception to [the] minimum 15% recovery is in the case where the information has already been disclosed and the person qualifies as an 'original source' but where the essential elements of the case were provided to the government or news media by someone other than the *qui tam* plaintiff." 132 Cong. Rec. 29322 (1986)." *Id.*



Third Circuit also produced a helpful chart for determining the ranges of awards, as follows:

Relator's Share	Types of Cases
15-25%	<ol style="list-style-type: none"> <li>1. relator brings an action that is not "based upon" publicly disclosed information</li> <li>2. "original source" brings an action that is "based upon" but not "primarily based" on publicly disclosed information</li> <li>3. "original source" brings an action that is "primarily based" on publicly disclosed information, but the "original source" provided the information</li> </ol>
≤ 10%	"original source" brings an action that is "primarily based" on publicly disclosed information, and
0%	<ol style="list-style-type: none"> <li>1. "original source" did not provide that information</li> <li>2. relator brings an action that is subject to dismissal under § 3730(e)(4).<sup>153</sup></li> </ol>

The Third Circuit's chart correctly categorizes the levels of rewards available to relators depending upon their level of knowledge and contribution to the FCA case.<sup>154</sup>

Based upon the plain language of the statute, it is clear, therefore, that Congress intended a graduated level of reward for graduated levels of direct and independent knowledge. In other words, the *qui tam* provisions intended that one relator might know more information than another. This dispels the notion that every relator must know the same level of information regarding the fraud scheme or that every relator must actually see the fraudulent statements made to the government in order to qualify as an original source.

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153. *Merena*, 205 F.3d at 104.

154. The chart does not address where the government declines to intervene and the relator proceeds, in which case the relator's share is between 25 and 30 percent. 31 U.S.C. § 3730(d)(2).

The courts, therefore, must be careful not to set as the threshold standard the same standard needed to earn the full 10 percent for cases primarily based upon public disclosures or yet at the full 25 percent in any case outside of the based-upon-public-disclosure setting in which the government intervenes. Otherwise, the courts would undo the graduating scale. To require all relators to meet the same level of knowledge as one earning the high end of the 15 to 25 percent range would render the entire zero to 10 percent category superfluous. In other words, the threshold standard for “original source” status cannot be the same for the zero to 10 percent range provision as it would be for the 15 to 25 percent range provision.<sup>155</sup> Each of these two categories contains differing standards and criteria for the amount of reward based upon graduating knowledge and support to the case.<sup>156</sup>

In sum, the *qui tam* provisions contemplated graduated knowledge, and therefore the courts should not impose a requirement that every relator possess the exact same level of information. If a court goes beyond the author’s restatement, i.e. direct and independent knowledge of information that supports an essential element of the FCA cause of action, it would impermissibly constrict the graduation scheme of the statute. Similarly, to impose a requirement upon every relator that they actually see the invoice or false statement would improperly bar those who should be at least eligible for some reward under the sliding scale scheme set in place by Congress. In sum, the author’s restatement sets the standard in a manner true to the text and purpose of the statute.

### *c. The Majority View*

The various circuits have each taken a shot at putting into words just how much information a relator must have to meet the threshold standard of being an original source.<sup>157</sup> As shown below, except for *dicta* in one circuit case,<sup>158</sup>

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155. *Id.* at § 3730(d)(1).

156. Compare the zero and 10 percent range for cases where the relator’s knowledge is “based primarily on” qualifying public disclosures with the 15 to 25 percent range for cases where the government intervenes and the relator’s knowledge is not based primarily on such publicly disclosed information. *See id.*

157. As discussed in this article, none of the circuits require a relator to possess direct and independent information of “all” facts, and none permit a relator to merely possess “background” information, including the Tenth Circuit. *See* United States ex rel. Kennard v. Comstock Res., Inc., 363 F.3d 1039, 1045 (10th Cir. 2004).

158. United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh, 186 F.3d 376, 389 (3rd Cir. 1999).

all of the circuit cases that have directly ruled upon this issue are in basic harmony with the author's restatement.

The circuits generally have applied a test designed to require that the relator possess some element of critical information relating to the underlying fraud itself.<sup>159</sup> For instance, the Second Circuit requires that the relator must be "the source of the core information" upon which the *qui tam* complaint is based.<sup>160</sup> Similarly, the D.C. and Sixth Circuits state that a relator must possess direct and independent knowledge of "any essential element of the underlying fraud transaction."<sup>161</sup> The Ninth Circuit treats the statutory phrase as requiring a relator to have firsthand knowledge of the "alleged fraud."<sup>162</sup> The Tenth Circuit interprets this phrase to mean "information underlying or supporting the fraud allegations" in the complaint.<sup>163</sup> And the Eighth Circuit uses a slightly different way of saying essentially the same thing, upholding a relator if he "has direct knowledge of the true state of the facts."<sup>164</sup> As explained above, the author's restatement best meets the text and purpose of the statute, and establishes a uniform standard.

*d. The Third Circuit Distinguished*

In one Third Circuit opinion, there is *dicta* suggesting the relator must not only have direct and independent knowledge of the thrust of the fraudulent

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159. In addition, in a short opinion, the Fourth Circuit held that the relators failed to show that they had direct and independent knowledge of the "bait and switch" allegation which had been publicly disclosed. *Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000). The court noted that the relators were lawyers who learned their information second-hand during another lawsuit. *Id.* While not specifically indicating a standard, it is inferred that the relator must have had direct and independent information relating to the heart of the fraud allegation.

160. *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1159 (2nd Cir. 1993).

161. *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994); *United States ex rel. Branhan v. Mercy Health System of Southwest Ohio*, No. 98-3127, 188 F.3d 510, 1999 WL 618018, at \*8 (6th Cir. 1999) (citing *Springfield*).

162. *United States ex rel. Aflatooni v. Kitsap Physicians Services*, 163 F.3d 516, 524-26 (9th Cir. 1998); *Seal 1 v. Seal A*, 255 F.3d 1154, 1162 (9th Cir. 2001).

163. *United States ex rel. Hafter v. Spectrum Emergency Care*, 190 F.3d 1156, 1162 (10th Cir. 1999).

164. *U.S. ex rel. Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2002) (citing *Springfield*). "A false claim consists of a representation contrary to fact, made knowingly or recklessly. If the relator has direct knowledge of the true state of the facts, it can be an original source even though its knowledge of the misrepresentation is not first-hand." *Id.*

scheme, but also have personally seen or heard the actual misrepresentations made to the government. In *Mistick*, the relator was the general contractor for the defendant companies for work done on HUD properties.<sup>165</sup> Over time, the relator suspected that the companies he had done contracting work for had concealed information from HUD. The relator did not know but speculated that the companies knew, prior to entering contracts, that their supplier had stopped making a product to encapsulate lead-based paint for HUD projects.<sup>166</sup> The relator thought that perhaps the defendants had committed fraud if they had asked for increased costs for changed circumstances that might not have truly been changed circumstances. The relator felt if he could investigate the issue and find out if the company lied to HUD, he might be able to prove an FCA claim.<sup>167</sup>

Therefore, the relator “began what it terms ‘an investigation . . . undertaken . . . for the purpose of gathering information on the [defendants’] relationship with HUD.’”<sup>168</sup> As part of this investigation, the relator filed a Freedom of Information Act (FOIA) request with HUD and received copies of the defendants’ letters containing the purported false statements.<sup>169</sup> Essentially, the relator learned from its FOIA requests the timing of defendants’ statements to HUD regarding when they learned of the discontinued product.<sup>170</sup> Thereafter, the relator filed a *qui tam* based upon the information learned through the FOIA request.<sup>171</sup>

The district court in *Mistick* determined that the court lacked jurisdiction over the relator’s claim. First, it found that there had been a prior public disclosure.<sup>172</sup> Second, it ruled that the relator was not an original source because his *qui tam* was based upon the public disclosure, and he lacked direct and independent knowledge of the underlying information supporting the

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165. United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh, 186 F.3d 376, 389 (3rd Cir. 1999). The term “HUD” refers to the United States Department of Housing and Urban Development.

166. *Id.* at 376–82.

167. *Id.*

168. *Id.* at 381.

169. *Id.*

170. *Id.*

171. *Id.* at 382. In that case, the DOJ had declined to intervene and the case was dismissed. *Id.* Therefore, it was never established that the defendants committed fraud.

172. *Id.* at 382.

complaint.<sup>173</sup> Rather, the relator obtained his knowledge from public records, via the FOIA request.<sup>174</sup>

In affirming the decision, the Third Circuit in *Mistick* made two broad statements.<sup>175</sup> First, it stated that a relator cannot possibly be an original source when he “did not have ‘direct and independent’ knowledge of the most critical element of its claims, viz., that the [defendant] had made the alleged misrepresentations to HUD. . . .”<sup>176</sup> Second, the court added, “While ‘it is not necessary for a relator to have all the relevant information in order to qualify as ‘independent,’” a relator cannot be said to have ‘direct and independent knowledge of the information on which its fraud allegations are based’ if the relator has no direct and independent knowledge of the allegedly fraudulent statements.”<sup>177</sup>

The first of the two pronouncements by the Third Circuit, i.e. requiring “knowledge of the most critical element of its claims,” is not troubling. A relator should have direct and independent knowledge of an essential element of the fraudulent scheme. However, the language indicating that a relator must also have “direct and independent knowledge of the allegedly fraudulent statements” would be a major concern if the court truly intended the original source rule to require actually seeing the invoices or false statements that payment was due in order to qualify.

To the extent that this language is viewed in the context of a relator learning all of his information from recognized public disclosures, the result of the case stands on firm ground. To the extent, however, that a defendant can argue today that this case requires, as a condition of attaining original source status, a relator to possess firsthand knowledge of the false statements or claims actually submitted to the government, it would sweep too far.<sup>178</sup>

As discussed earlier, the FCA cannot possibly stand for the proposition that every relator must actually see with his or her own eyes the specific fraudulent

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173. *Id.*

174. *Id.*

175. The court also said, “[A] relator who would not have learned of the information absent public disclosure [does] not have ‘independent’ information. . . .” *Id.* at 389 (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3rd Cir. 1991)).

176. *Id.* at 388.

177. *Id.* at 389 (citations omitted).

178. If the courts required actually seeing the false statement submitted to the government, a company could totally insulate itself from all *qui tam* complaints simply by designating just one person to actually submit the claims to the government. It likely would be the instigator of the fraud. That way, no one but the fraud-doer will be able to actually see the false statement.

statement made by the wrong-doer to the government. Indeed, often only the wrong-doer has specific knowledge. Recall the two illustrations. The manager was told to use a non-conforming metal when building an aircraft, but did not actually see the false statements or invoices. The coding clerk similarly was asked to carry out the fraud of upcoding thousands of procedures that would be billed to Medicare, but she did not see the final invoices or directly see the false statements to the government. These relators should not be barred from bringing a *qui tam* merely because they did not see the actual false statements made to the government, but otherwise had direct and independent knowledge of key elements of the fraudulent schemes. If the standard required every relator to see the false statements or invoices in order to be an original source, the clock would be turned back to the days of the 1943 FCA amendments, which few relators could meet.

The D.C. Circuit correctly points out that such an approach would violate the very purpose of the FCA.<sup>179</sup> It expressed a valid concern over any relator being able to meet such a high standard, stating, “[r]arely would be the case in which relators could gain ‘original source’ status, if such were the standard, because the misrepresented state of affairs . . . would almost always have been disclosed to the government independently by the alleged defrauder.”<sup>180</sup> Similarly, the Eighth Circuit held that “if the relator has direct knowledge of the true state of the facts, it can be an original source even though its knowledge of the misrepresentation is not first-hand.”<sup>181</sup>

Putting *Mistick* in context of the facts of that case demonstrates that the court was simply reaching the right result in one particular case. In fact, in a later decision by the Third Circuit, it characterized *Mistick* as one where “the relator had only strictly secondhand information of a fraud it did not directly observe.”<sup>182</sup> In *Paranich*, the Third Circuit also stated, in *dicta*, that the relator in *Paranich* would “have direct knowledge of the billing scheme because he was *involved* in it.”<sup>183</sup> The Third Circuit did not suggest that the relator must also see the invoice or false claim. In other words, after *Mistick*, the Third Circuit suggested that being involved with the fraud would be sufficient to

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179. United States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 657 (D.C. Cir. 1994).

180. *Id.*

181. U.S. ex rel. Minn. Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1050 (8th Cir. 2002) (citing Springfield).

182. United States ex rel. Paranich v. Sorgnard, et al., 396 F.3d 326, 336 n.11 (3rd Cir. 2005).

183. *Id.* at 336 (emphasis in original).

establish original source status.<sup>184</sup> Accordingly, *Mistick* can be viewed as being in harmony with the author's restatement of the law, which reads: "The relator must have direct and independent knowledge of information that supports an essential element of the FCA cause of action."<sup>185</sup>

*E. The Relator's Role in the Public Disclosure*

Two circuits have interpreted the phrase "the information" contained in the public disclosure bar<sup>186</sup> as a reference back to the 'allegations or transactions' that were publicly disclosed, which leads to the conclusion that the would-be relator must be the source *to the public discloser* prior to the public disclosure.<sup>187</sup> This analysis is incorrect and the majority of circuits have rejected it.<sup>188</sup>

The Third Circuit correctly noted that requiring a relator to not only have direct and independent knowledge of the information upon which its allegations are based but to also have a hand in the public disclosure itself, would render the original source exception superfluous.<sup>189</sup> The Seventh Circuit also rejected this view "as having no basis in the text or legislative history."<sup>190</sup> The Seventh

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184. In *Paranich*, the Third Circuit refused to answer what it stated was the open question of whether a relator who had direct knowledge of an overall fraud scheme must have separate direct knowledge as to the role of each named defendant. 396 F.3d at 336. The Third Circuit could not consider this an open question if it had truly shut the door in *Mistick* for anyone becoming an original source without actually seeing the false statement submitted by each defendant. *Id.*

185. See *infra* Section IV. The author's restatement continues: "This does not require the relator to possess direct and independent knowledge of the invoice or misrepresentations made to the government. In addition, the relator need not be the source to the public discloser or have had a hand in the public disclosure itself." *Id.*

186. 31 U.S.C. § 3730(e)(4)(A).

187. *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2nd Cir. 1990); *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992).

188. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3rd Cir. 1991); *United States ex rel. Siller v. Becton Dickinson & Co. By and Through Microbiology Systems Div.*, 21 F.3d 1339 (4th Cir. 1994); *United States v. Bank of Farmington*, 166 F.3d 853, 865 (7th Cir. 1999); *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006–07 (10th Cir. 1996); *United States ex rel. Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 565, 565 n.4, 568 n.13 (11th Cir. 1994).

189. *United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 385–88 (3rd Cir. 1999).

190. *United States v. Bank of Farmington*, 166 F.3d 853, 865 (7th Cir. 1999) (citing to Third, Fourth, Tenth, and Eleventh Circuit opinions).

Circuit explained that the added requirement was actually contrary to the text of the statute. As the court stated,

The statute says that the jurisdictional bar operates when a *qui tam* claim is based upon publicly disclosed allegations or transactions “unless . . . the person bringing the action is an original source of the information.” 31 U.S.C. § 3730(e)(4)(A) (emphasis added). It does not say “is an original source of the public disclosure.”<sup>191</sup>

In short, because the statute is not ambiguous on this point, a court cannot simply add another requirement beyond the language of the legislation. In fact, the Eight Circuit stated, “[t]hat rule would perhaps be an improvement in the operation of the original source provision, but it has no basis in the statutory language and we therefore decline to adopt it.”<sup>192</sup>

Therefore, this Article argues that the Supreme Court should not adopt as a standard that in order to qualify as an original source a relator must either be the source to the public discloser or have had a hand in the public disclosure itself. Rather, it is sufficient if the relator meets the author’s restatement set forth in Section IV.

#### F. *The Trigger Test*

There is at least one additional manner, which relates to the original source exception, where one circuit court veered off track and needs to be reined back. The Ninth Circuit begins harmlessly enough by stating a standard consistent with the author’s restatement, i.e., requiring a relator to have firsthand knowledge of the “alleged fraud.”<sup>193</sup> However, the court does not stop there. The Ninth Circuit plows totally new ground by impermissibly expanding the original source exception beyond “the direct and independent knowledge of the relator” in certain limited instances. According to the Ninth Circuit, if the relator “triggers” a government investigation that leads to additional fraud unknown to the relator, the relator may still claim a share in the fruits of the government’s investigation.<sup>194</sup>

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191. *Id.*

192. U.S. ex rel. Minn. Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1048 (8th Cir. 2002).

193. United States ex rel. Barajas v. Northrop Corp., 5 F.3d 407, 411 (9th Cir. 1993); United States ex rel. Aflatooni v. Kitsap Physicians Services, 163 F.3d 516, 524–26 (9th Cir. 1998); Seal 1 v. Seal A, 255 F.3d 1154, 1162 (9th Cir. 2001).

194. *Barajas*, 5 F.3d at 411; *Aflatooni*, 163 F.3d at 524–26; Seal 1 v. Seal A, 255 F.3d 1154, 1162 (9th Cir. 2001).



*Barajas*, the Ninth Circuit’s seminal case dealing with this point, exceeds the outer extent of the original source exception.<sup>195</sup> In *Barajas*, the relator filed a *qui tam* action which triggered a government investigation that ultimately led to the indictment of the defendant on separate fraud allegations, which had been unknown to the relator.<sup>196</sup> The relator amended his *qui tam* to add the allegations from the indictment.<sup>197</sup> The Ninth Circuit held that because the relator was an original source of the initial allegations, he could also be treated as an original source of the new allegations because he “triggered” the investigation that led to the new fraud claims.<sup>198</sup>

This “trigger” approach has been rejected by all other circuits that have addressed the issue, and it was later restricted by the Ninth Circuit itself in *Seal I*.<sup>199</sup> For instance, the Eighth Circuit stated that a relator is only an original source of the type of claim of which he has direct and independent knowledge, and not for additional claims uncovered by the government during its investigation.<sup>200</sup> In the case before the Eighth Circuit, the relator had identified one type of fraud, but a later audit revealed ten additional types of fraud. The Eighth Circuit held that the relator was an original source for just the one type of fraud where he had knowledge of the fraudulent scheme.<sup>201</sup>

Other circuit courts have indirectly rejected the trigger theory by instead applying a “claim-by-claim” approach. For instance, the Third Circuit in *Smithkline Beecham*<sup>202</sup> addressed the issue of whether a relator must be an original source of each of the claims in a multi-count *qui tam* complaint. The court ruled that

it seems clear that each claim in a multi-claim complaint must be treated as if it stood alone. It follows, therefore, that in determining whether the relators in this case are entitled to a share of any proceeds that are attributable to the “automated chemistry” claims,

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195. *Barajas*, 5 F.3d at 411.

196. *Id.*

197. *Id.* at 408.

198. *Id.*

199. *Seal I*, 255 F.3d at 1162.

200. United States ex rel. Hays v. Hoffman, 325 F.3d 982, 986–89 (8th Cir. 2003) (rejecting catalyst theory).

201. *Id.*

202. United States ex rel. Merena v. Smithkline Beecham Corp., 205 F.3d 97, 101–102 (3rd Cir. 2000).

we must consider whether they would have been entitled to such a share had their complaints asserted those claims alone.<sup>203</sup>

This became known as the “claim-by-claim” analysis.<sup>204</sup>

In the wake of criticism, the Ninth Circuit significantly pulled back from its *Barajas* “trigger” ruling in the case *Seal I*.<sup>205</sup> It announced what the author describes as a refined trigger test,<sup>206</sup> setting forth the following factors for determining whether a relator should be credited with the fruit of a government investigation uncovering fraud of which the relator lacked direct and independent knowledge:

(1) the degree to which the relator’s information helped uncover the later allegations; (2) the degree to which other private actors helped uncover those allegations; (3) the degree to which the government played a role in uncovering those allegations; and (4) whether the later allegations are brought against the same entity as the earlier allegations.<sup>207</sup>

In *Seal I*, the relator alleged that a computer manufacturer sold new computers to the government containing used parts.<sup>208</sup> It was not disputed that the relator had direct knowledge of that fraud scheme with respect to the primary defendant.<sup>209</sup> However, the relator merely presumed that competing computer manufacturers were doing the same thing, and therefore named them as defendants in his *qui tam* action in the hopes that the government might initiate an industry wide investigation.<sup>210</sup> The Ninth Circuit chose not to abandon the trigger test, but rejected its application in that case. According to the Ninth Circuit, under the refined trigger test, the relator played too much of an insufficient role in uncovering the later allegations made against different entities to meet the original source requirements.<sup>211</sup>

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203. *Id.* at 102.

204. *Id. Accord* United States ex rel. Urbanek v. Lab. Corp. of Am. Holdings, Inc., No. Civ. A. 00-CV-4863, 2003 WL 22795324, at \*6 (E.D. Pa. Nov. 21, 2003); United States ex rel. Tillson v. Lockheed Martin Energy Sys., Inc., et al., No. Civ. A. 5:000-39-M, 2004 WL 2403114, at \*6 (W.D. Ky. Sept. 30, 2004).

205. *Seal I*, 255 F.3d at 1162.

206. Rockwell refers to the trigger test as a “proximate cause concept.” See Petition for a Writ of Certiorari, *Rockwell*, No. 05-1272, 2006 WL 886721, at \*19 (Apr. 4, 2006).

207. *Seal I*, at 1163.

208. *Id.* at 1164.

209. *Id.* at 1163.

210. *Id.*

211. *Id.*

This Article argues that this particular form of a trigger test may promote speculation. This does not mean, however, that a relator should not be credited with the entire fraudulent scheme itself. For instance, if a relator is an original source of the allegations that a company is engaged in an upcoding scheme, the relator does not need to know of each instance of upcoding or the full extent of the scheme. Nor does the author argue that if the relator mislabels the type of scheme or advances a different theory for the same misconduct that the relator would fall outside of the direct and independent knowledge requirement. Instead, this Article argues that a relator cannot allege one type of a scheme, such as upcoding, and then be credited with a later government investigation into an entirely different type of scheme, such as kickbacks.

The Ninth Circuit's trigger test is incorrect to the extent that it credits a relator with totally separate fraud schemes uncovered by a government investigation, which are not closely related to the allegations. The Ninth Circuit in *Seal I* appears to be headed in the right direction. In that case, the court refused to allow the trigger test to extend to claims against totally separate parties based only upon a hunch that another company might be engaged in a similar scheme.

In sum, the Supreme Court should not adopt a broad "but for" trigger test. Instead, in an original source setting, courts should examine whether the firsthand information supplied by the relator fairly relates to the ultimate claims pursued by the government. Again, the relator's claim can differ somewhat from the government's allegations after investigation. It is certainly expected that the government will pursue a broader range and extent of the relator's claim. Therefore, it is sufficient that the relator's alleged claim is of a similar type of misconduct by the alleged wrongdoer.

#### IV. RESTATING THE LAW FOR THE ORIGINAL SOURCE EXCEPTION

The False Claims Act (FCA) provides that a *qui tam* action may not be based upon a qualifying public disclosure of information unless the relator is an "original source" of that information.<sup>212</sup> The pertinent language of the statute reads:

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office

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212. 31 U.S.C. § 3730(e)(4)(A)–(B).

report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, “original source” means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.<sup>213</sup>

This jurisdictional inquiry, or public disclosure bar analysis, requires the following analysis:

1. Was there a recognized “public disclosure” under the FCA?  
*If yes*, go to 2. *If no*, end of inquiry. The relator may proceed.
2. Was the *qui tam* “based upon” the public disclosure?  
*If yes*, go to 3. *If no*, end of inquiry. The relator may proceed.
3. Was the relator an “original source” of the information in his complaint that supports an essential element of the FCA cause of action?
  - A. Did the relator have “direct” knowledge of such information?  
*If yes*, go to 3B. *If no*, end of inquiry. The relator may not proceed.
  - B. Did the relator have “independent” knowledge of such information?  
*If yes*, go to 3C. *If no*, end of inquiry. The relator may not proceed.
  - C. Did the relator “voluntarily provide” such information to the government prior to filing the *qui tam* suit?  
*If yes*, the relator may proceed. *If no*, the relator may not proceed.

As depicted by this framework, the “public disclosure bar” only applies if the answers to both of the first two numbered questions are affirmative, i.e. that there was a recognized public disclosure under the FCA, and the *qui tam* complaint was “based upon” such public disclosure. If the answer to either question is no, then the public disclosure bar does not apply and the *qui tam* action may proceed.

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213. *Id.*

If the public disclosure bar applies, there is a three-part test for determining if the “original source exception” applies. The relator must possess both “direct and independent knowledge of the information on which the allegations are based.”<sup>214</sup> In addition, the relator must have voluntarily provided the information to the government prior to filing the *qui tam* suit.

The first two questions of the original source prong are intertwined and should be addressed together. Did the relator have both direct and independent knowledge of the information on which the allegations are based? The term “direct” means firsthand knowledge derived from the source without interruption or knowledge gained by the relator’s own efforts rather than learned second-hand through the efforts of others. The term “independent” means knowledge not derived from or dependent upon the public disclosure itself. The phrase “information on which the allegations are based” refers to the information contained in the relator’s *qui tam* complaint. The relator’s direct and independent knowledge cannot be of mere background information. The relator must have direct and independent knowledge of information that supports an essential element of the FCA cause of action. This does not require the relator to possess direct and independent knowledge of the invoice or misrepresentations made to the government. In addition, the relator need not be the source to the public discloser or have had a hand in the public disclosure itself.

## V. CONCLUSION

Considering the disagreement among the federal circuits regarding the meaning of the “original source exception” of the False Claims Act as well as the importance of the statute as an enforcement tool, the Supreme Court must establish a uniform standard applicable to all *qui tam* cases. The restatement of the original source exception proposed in this Article will provide the courts with a framework leading to consistent results, while remaining true to the text and purposes of the *qui tam* provisions. Specifically, the restatement provides definitions of key terms and proposes as a standard to qualify as an original source the relator must have direct and independent knowledge of information that supports an essential element of the FCA cause of action. It also establishes lower and upper limits to this standard, including that it is not met by firsthand knowledge of background information, but does not require direct and independent knowledge of the technical misrepresentations made to the government or that the relator have had a hand in the public disclosure itself.

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214. *Id.* at § 3730(e)(4)(B).

Accordingly, the Supreme Court and the lower courts are invited to adopt this proposed restatement.